BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEVEN D. BROOKS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,034,525
K.C. FLATWORK CONCRETE, INC.[1]	)	
Respondent	)	
AND	)	
	)	
HAWKEYE SECURITY INSURANCE COMPANY and CONTINENTAL WESTERN INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent and Continental Western Insurance Company appealed the August 9, 2010, Award and August 19, 2010, Order Nunc Pro Tunc entered by Special Administrative Law Judge Seth Valerius (SALJ). The Workers Compensation Board (Board) heard oral argument on December 2, 2010. E. L. Lee Kinch was appointed as Board Member Pro Tem by Acting Workers Compensation Director Seth Valerius for the purposes of this appeal and participated in the oral argument to the Board.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared for claimant. Stephanie Warmund of Kansas City, Missouri, appeared for respondent and Hawkeye Security Insurance Company (Hawkeye Security). Nathan D. Burghart of Lawrence, Kansas, appeared for respondent and Continental Western Insurance Company (Continental Western).

[1] Claimant was employed at K.C. Flatwork Concrete, Inc., which is now known as American Concrete Construction. (See P.H. Trans. at 10.)

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

In the August 9, 2010, Award, the SALJ found claimant sustained a series of work-related accidental injuries while working for respondent through April 27, 2007. The SALJ determined claimant sustained a 10 percent whole body impairment with regard to his low back but denied compensation for claimant's cervical spine. The SALJ found claimant was permanently and totally disabled as a result of his work-related activities and accidents during the course of his employment with respondent through April 27, 2007, and awarded claimant benefits for same. The SALJ determined claimant had a preexisting impairment of 7.5 percent and that claimant's compensation was to be reduced for that preexisting impairment.

The SALJ found the issue of additional temporary total disability benefits to be moot as claimant was found to be permanently and totally disabled from engaging in any kind of employment. After finding the exact amount of claimant's base wage could not be determined from a review of the wage exhibits, the SALJ found that the provisions of K.S.A. 2006 Supp. 44-511(b)(5) should be used. As claimant only worked 16 weeks during the period from October 27, 2006, through April 27, 2007, the SALJ determined claimant's average weekly wage was $945.05.

On August 19, 2010, the SALJ entered an Order Nunc Pro Tunc after noting the issue of the payment of medical bills had not been addressed in the prior Award. The SALJ ordered the payment of the bills (offered through stipulation) to the extent they were related to claimant's low back and so long as they complied with K.S.A. 2006 Supp. 44-510i(e).

Continental Western contends claimant's injuries did not arise out of and in the course of his employment. It argues the SALJ erred in reviewing the evidence regarding the causation of claimant's lower back problems and grossly misinterpreted the report of the court-ordered IME physician, Jeffrey T. MacMillan, M.D. Continental Western also contends that the SALJ erred in considering certain medical records that were not part of the record for the final award. Continental Western argues the testimony of claimant's two medical experts is flawed, inconsistent and does not constitute competent evidence. Continental Western requests the Board to agree with its medical expert, David K. Ebelke, M.D., and the court-ordered IME physician, Dr. MacMillan, and determine this claim is not compensable.

If this claim is found to be compensable, Continental Western asserts liability for the medical bills in dispute, which primarily relate to claimant's August 13, 2007, back surgery, should be limited to the statutory maximum for unauthorized medical benefits.

With regard to claimant's average weekly wage, Continental Western believes the SALJ properly considered K.S.A. 2006 Supp. 44-511(b)(5) in computing the wage but the SALJ misapplied that statute by dividing the gross amount of wages by 16 weeks rather than 26 weeks. It contends a plain and literal reading of the statute indicates claimant's gross wages should be divided by 26 weeks and, therefore, Continental Western submits the correct average weekly wage should be no more than $581.57.

Hawkeye Security contends the denial of benefits against it was the proper conclusion based upon the evidence and should be upheld. It argues that there is no evidence that any injury claimant sustained in 2006 occurred before October 31, 2006, when it was on the risk. Thus, Hawkeye Security contends that claimant has failed to prove that an accident occurred during its period of coverage. To the extent that the SALJ did not award benefits against it, Hawkeye Security maintains the Award should be affirmed.

Claimant contends he met with personal injury by accident arising out of and in the course of his employment with respondent. In addition to his low back, claimant contends his cervical spine condition is also compensable. Further, he maintains he is permanently and totally disabled. Claimant contends his average weekly wage was no less than $1,300.80 per week and that if any modification to his wage is made, it should be an increase, although doing so will not affect the compensation rate. Claimant argues respondent is liable for the medical bills in dispute. With regard to the reduction of the award for preexisting functional impairment, claimant states:

> [T]he impairment established at the time of that settlement [for an August 1984 injury] would have to be established in the same manner as impairment is established under current Kansas Law which requires the utilization of AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Since this treatise did not come into effect until 1993, any disability which existed in 1984 could not have been determined in accordance with current Kansas law. Therefore, the credit given was mistakenly given and should be deleted from the decision.[2]

[2] Claimant's Brief (filed Nov. 1, 2010) at 12.

The issues before the Board on this appeal are:

1. Did claimant suffer an accidental injury or injuries which arose out of and in the course of his employment with respondent?

2. Is claimant entitled to payment by respondent of medical bills associated with that accident and the resulting injuries? If so, are those medical bills to be paid as authorized or unauthorized medical expenses? The SALJ in the Order Nunc Pro Tunc issued August 19, 2010, ordered medical bills paid "to the extent that they are related to the claimant's low back and comply with K.S.A. 501i(e) [*sic*], are ordered to be paid pursuant to K.S.A. 501j(h) [*sic*]". Respondent and Continental Western dispute the bills associated with the August 13, 2007, surgery with John Gianino, M.D., claiming the surgery was performed without authorization and respondent's liability should be limited to the $500.00 unauthorized medical expense allowed under K.S.A. 2006 Supp. 44-510h(b)(2).

3. What was claimant's average weekly wage on the date of accident? The parties stipulated at oral argument to the Board that claimant earned a total of $15,120.81 during the 26 weeks before the date of accident. The question remaining is whether that figure is to be divided by 16 or 26 weeks, with this determination depending on whether the Board finds that calculation should include the weeks that claimant was unable to work due to adverse weather.

4. What is the nature and extent of claimant's injuries and disability?

5. Is claimant entitled to 5.71 weeks of additional TTD for the period from April 27, 2007, through June 6, 2007? In the Award, the SALJ found that, as claimant was permanently and totally disabled, the issue of additional TTD was rendered moot. This issue was listed by respondent and Continental Western in its application to the Board. However, no argument was presented to the Board on this issue, either in the briefs or at oral argument.

6. Is respondent entitled to a credit under K.S.A. 2006 Supp. 44-501(c) for claimant's preexisting functional impairment? Claimant suffered a low back injury while working for Brooks Construction Company in 1984. That matter was settled, without the suggested surgical intervention, for a 15 percent whole person impairment. The medical reports of Roger P. Jackson, M.D., were attached and assessed claimant an impairment of 7 to 8 percent to the whole person. The ALJ, based on the opinion of Dr. Jackson, found claimant to have suffered a preexisting impairment of 7.5 percent to the whole person.

7. Did claimant submit timely written claim? This issue was listed in respondent and Continental Western's application to the Board. However, at the regular hearing, respondent and Continental Western admitted that written claim for the April 26 and 27, 2007, dates of injury were timely submitted.[3] Therefore, the issue of timely written claim only applies to the October 6, 2004, and on or about November 20, 2006,[4] dates of accident.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant had worked for respondent for about 3 years as a working foreman when, on October 6, 2004, while pouring and finishing concrete, claimant felt a pain in his back. Claimant testified that he was stretched in an awkward position when the accident occurred. Claimant notified his employer several times, asking for workers compensation forms. None were ever made available to claimant. Claimant's job required that he do layout work, dump concrete, perform manual labor and perform all the duties of a concrete worker. Claimant sought medical treatment on his own at Truman Medical Center and was provided physical therapy and was advised to take over-the-counter pain medications. Claimant improved with the physical therapy. Claimant testified that a winter layoff was normal in this profession and he was laid off for a short period of time during the winter of 2005.

In early 2006, claimant again returned to work for respondent, performing his normal duties. In the fall of 2006, claimant was injured while driving a Georgia buggy (buggy).[5] Claimant was forced to turn the buggy sharply to avoid hitting a vehicle. The exact date of this alleged accident is unclear. However, claimant argued in his brief to the Board that it occurred in November 2006, and testified that it occurred sometime around Thanksgiving 2006. The platform on the buggy hit claimant in the low back, throwing him to the ground. The buggy then ran over claimant's ankle. Claimant reported the accident to Ron Lewis, an estimator for respondent, and also told Dennis Gander, a supervisor.

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[3] R.H. Trans. at 12.

[4] Regarding the second accident, there is testimony that it happened the week of Thanksgiving. (See P.H. Trans. at 21-23, 44-47 & 51). According to Dr. Stuckmeyer, it occurred November 23, 2006. (See Stuckmeyer Depo. at 6 & Ex. 2 at 1.)

[5] A Georgia buggy is a machine used to haul concrete when a truck cannot get to the site. (See P.H. Trans. at 16.)

Within two days, claimant also told both owners of respondent of the accident. Claimant was again denied medical treatment. Claimant continued to work his regular job, and his symptoms began to worsen. Claimant was forced to begin using a cane to walk. Claimant testified that his employer allowed him to work at his own pace and to ask for assistance whenever he needed it. Claimant continued working until the 2006 winter layoff.[6] Claimant again sought medical treatment on his own. Claimant advised respondent of the need for medical treatment, but none was provided. Claimant returned to Truman Medical Center where he was provided with physical therapy and underwent an MRI in March 2007 and bone scan in April 2007.

Claimant returned to work in early 2007, again performing his regular duties as he was able. On April 26 or 27, 2007, while working at the Kansas City Zoo, claimant was down on his knees, showing workers what he wanted them to do in the area of a drain. When claimant attempted to get up, he was unable to rise. When claimant put weight on his legs, they would go right out from under him. Claimant was experiencing significant pain in the middle of his back and down his legs. Respondent's employees had to help claimant stand up and helped him to his truck, where claimant spent the remainder of the workday.

The next day, when claimant tried to get up, his legs went out and claimant fell. He managed to get to work, although he was forced to use two canes for balance. Claimant was required to drive the Georgia buggy due to respondent being short-handed. When the buggy hit a bump or slope, it jerked and claimant almost fell off the buggy. He jerked his back and lost control of his bladder. This was the first time this had ever happened to claimant. He again had to be helped to his truck. At this time, claimant determined that he was "pretty much done for".[7] Claimant again notified Ron Lewis about the incident and again medical treatment was not provided.

Claimant has been unable to work since the 2007 buggy incident. Claimant continued to receive medical treatment through Truman Medical Center, undergoing a laminectomy at L4-S1 on August 13, 2007. The surgery helped with claimant's leg pain but did not totally eliminate it nor did it improve the back pain. Claimant has a sitting tolerance of less than two hours, a standing tolerance of less than five minutes and can walk less than 100 yards. He ambulates with a walker and occasionally uses a wheelchair.

[6] The layoff period was from the end of 2006 through early 2007.

[7] P.H. Trans. at 29.

Claimant was referred by his attorney to board certified orthopedic surgeon James A. Stuckmeyer, M.D., on September 23, 2008. Dr. Stuckmeyer reviewed electrodiagnostic studies performed by Dr. Terrence Pratt on February 25, 2008, which were consistent with L5-S1 nerve root irritation. Claimant also had diabetic-related polyneuropathy which Dr. Stuckmeyer opined was not related to claimant's work with respondent. Dr. Stuckmeyer noted that claimant had significant back pain with radiating symptoms into both lower extremities and claimant was only able to ambulate approximately 10 to 15 feet before his legs gave out. The diagnosis was "failed lumbar syndrome". Claimant was essentially wheelchair-bound and suffered with urinary incontinence. He agreed that, based on the MRI from March 22, 2007, the surgery performed on claimant's lumbar spine was necessary. He acknowledged that claimant had symptoms which predated the surgery and the April 2007 incident. The April 2007 event was not the prevailing factor. There was not one incident which could be identified as the "primary prevailer."[8] However, after the April 2007 incident, claimant's symptoms worsened. Prior to April 2007, claimant was not permanently and totally disabled. After April 2007, claimant was.

The history provided by claimant to Dr. Stuckmeyer described three separate work-related incidents which the doctor felt, combined with repetitive, heavy overuse and repetitive trauma, were the "direct proximate prevailing factor and the injury to the lumbar spine culminating in the upper procedure, but leaving this gentleman with rather catastrophic results".[9] Claimant was rated at 50 to 60 percent impairment for the lumbar condition pursuant to the fourth edition of the AMA *Guides.*[10] Dr. Stuckmeyer disagreed with the opinion of board certified orthopedic surgeon David K. Ebelke, M.D., who opined that none of claimant's impairment was attributable to his occupational duties with respondent. Dr. Stuckmeyer opined that claimant had a degenerative condition in his lumbar spine, but, as a result of repetitive activities, that condition was exacerbated, aggravated or accelerated to the point that surgical intervention was conducted. After reviewing the task list created by vocational expert Michael Dreiling, Dr. Stuckmeyer determined that claimant could no longer perform 13 of 16 tasks for an 81 percent task loss. However, in Dr. Stuckmeyer's opinion, claimant is realistically permanently and totally disabled.

Dr. Stuckmeyer's examination was limited to the lumbar spine. He did not examine claimant's cervical spine. Claimant exhibited no cervical symptoms and there were no

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[8] Stuckmeyer Depo. at 58.

[9] Ibid. at 24.

[10] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

complaints of cervical pain. Dr. Stuckmeyer formed no opinion either way as to whether claimant had cervical myelopathy. However, he did state that cervical myelopathy is a fairly common spinal cord disorder for persons over the age of 55. It typically comes on insidiously, developing over time without any precipitating event.

After the preliminary hearing, claimant received treatment from Dr. Pratt, who recommended a surgical consultation. That consult was provided by Dr. Ebelke on June 16, 2008. Dr. Ebelke diagnosed claimant with stenosis at L4-5. He described stenosis as a narrowing of the spinal canal where the nerves come down the back. An MRI from March 2007 also displayed a mild bulging disk at L4-5. Dr. Ebelke opined that spinal stenosis is not a work-related condition and would not be permanently aggravated by the incidents described by claimant. Stenosis is a condition that would be quiet until something triggers the onset of symptoms or it slowly gets worse.

Claimant was also diagnosed by Dr. Ebelke with cervical myelopathy and probable cervical stenosis as well. An MRI from January 28, 2010, showed severe spinal canal stenosis at C6-7, resulting in an area of compressive myelopathy within the cord. Claimant also had a bulging disk at C6-7. Claimant's spinal canal was only 2 millimeters in diameter. Dr. Ebelke had never seen one that small. If the canal was truly that small, he was surprised that claimant was walking at all. These findings were the result of long-term changes and were not an acute condition.

On cross-examination, Dr. Ebelke testified that the physical trauma at work did not matter. "I don't care if he was thrown on his head. It wouldn't make any difference. The details are not important".[11] He did agree that the trauma could call attention to the condition or trigger the onset of symptoms. The onset of the symptoms after each of these specific work-related incidents was just a coincidence. He agreed that the surgery at L4-5 was necessary and could help claimant's leg symptoms. Dr. Ebelke rated claimant at 10 percent to the whole person for the lumbar spine,[12] but testified that the entire 10 percent was preexisting. None of the impairment was related to claimant's work with respondent.

Claimant was referred by his attorney to board certified neurologist, neurophysiologist and psychiatrist Bernard M. Abrams, M.D., on December 23, 2009. Claimant provided Dr. Abrams with a long history of low back problems beginning as early as 1984. Several work-related incidents were detailed, including back pain while

[11] Ebelke Depo. at 31.

[12] It does not indicate in Dr. Ebelke's report what edition of the AMA *Guides* Dr. Ebelke used.

constructing a ramp, driving a Georgia buggy over rough ground and being thrown from the buggy. At the time of the examination, claimant had been under treatment for diabetic peripheral neuropathy for several years.

Dr. Abrams diagnosed claimant with myelopathy involving the spinal cord stemming from the falls suffered at work. Claimant was also diagnosed with chronic low back derangement leading to the decompressive spinal surgery by John Gianino, M.D., following the accident of April 26, 2007. The diabetic peripheral neuropathy diagnosis was not related to any industrial accident.

Dr. Abrams opined that the incident involving the loss of control of claimant's bladder was significant. However, he questioned whether the loss of control was related to the injuries to claimant's lumbar spine or the recently diagnosed cervical spine condition. He testified that the back injury alone would render claimant permanently and totally disabled. Dr. Abrams also testified that, while the 2007 accident was significant, it was a combination of all of claimant's incidents which led to the disability. He agreed that claimant would have had a disability regardless of the 2007 incident. The prevailing factor was the combined aggravation of all of the insults.

The initial April 21, 2010, deposition of Dr. Abrams was continued until May 26, 2010, for the purpose of obtaining additional medical reports and tests on claimant. These reports included medical records from Truman Medical Center and MRI reports on claimant's cervical, thoracic and lumbar spine. From these reports and tests, Dr. Abrams was able to identify myelopathy at C6-7 with a large broad-based disk protrusion with an annular tear. This means that claimant has a herniated disk in his cervical region. Spinal stenosis is causing marked pressure on the spinal cord, with the stenosis being caused by a number of things. However, the predominant feature is the herniated disk which, in his view, was traumatically induced. Dr. Abrams went on to testify that the Georgia buggy incident in November 2006 was the cause of claimant's cervical problems. The predominant feature is a "soft disk from a torn annulus" which is generally an acute traumatic event.[13] Dr. Abrams also opined that the loss of bladder control is, in all likelihood, from the cervical myelopathy. He identified claimant's cervical spine as being particularly narrow.

Dr. Abrams echoed the sentiment of Dr. Ebelke in discussing claimant's spinal canal being only 2 millimeters. Dr. Abrams cautioned that, at that level, claimant's spinal canal diameter should be 12 millimeters. The sudden worsening of claimant's conditions, including the bowel and bladder incontinence, was the result of the Georgia

[13] Abrams Depo. (May 26, 2010) at 10.

buggy trauma. Dr. Abrams rated claimant's functional impairment at 25 percent to the whole person pursuant to the fourth edition of the AMA *Guides*[14] for claimant's chronic pain. But, as noted above, he testified that claimant was not capable of returning to any substantial gainful employment.

Claimant was referred by Administrative Law Judge Marcia L. Yates Roberts for an independent medical evaluation (IME) with board certified orthopedic surgeon Jeffrey T. MacMillan, M.D., on May 20, 2009. The history provided Dr. MacMillan also discusses the three accidents as well as the daily work activities for respondent. Dr. MacMillan noted the lack of provided medical treatment until 2007. Dr. MacMillan was provided with a multitude of medical records, including MRI reports from January 1, 2008, and March 22, 2007. Claimant was diagnosed with multi-level spondylosis, moderate to severe central stenosis, multi-level degenerative disk disease and extensive post-surgery changes. EMG and nerve conduction studies from February 27, 2008, indicate L5-S1 nerve root irritation and possible peripheral polyneuropathy. Claimant's neurologic condition had worsened considerably over the previous several months. Dr. MacMillan rated claimant at 10 percent to the whole person, pursuant to the AMA *Guides*.[15] However, he opined that claimant's medical findings were the result of long-term degeneration. Dr. MacMillan was unable to pinpoint any specific accident, injury or work-related condition leading to this degeneration. The 10 percent whole person impairment, in his opinion, was preexisting.

Claimant was displaying early signs of cervical myelopathy. Dr. MacMillan estimated that he could easily rate claimant at 40 to 60 percent to the whole person for these cervical findings. However, he went on to state that there were insufficient diagnostic studies to confirm this. The functional impairment of 10 percent was limited to the lumbar findings only. Dr. MacMillan also noted that, in his opinion, claimant was physically incapable of returning to the open labor market for the remainder of his lifetime. His disability was permanent.

[14] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[15] It does not indicate in Dr. MacMillan's report which edition of the AMA *Guides* Dr. MacMillan used. The referral Order of Administrative Law Judge Marcia L. Yates Roberts does specify the AMA *Guides*, Fourth Edition.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[16]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[17]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[18]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[19]

Claimant has provided a detailed history of several incidents which occurred at work while he was performing heavy manual labor. These incidents occurred while claimant was working for respondent. Evidence contradicting claimant's testimony is not in this record. Respondent also argues that claimant's ongoing problems are the result of long-term degenerative conditions. Dr. Ebelke testified that this degeneration was not affected by claimant's work for respondent. Dr. Stuckmeyer opined that claimant's accidents and his ongoing labor for respondent aggravated claimant's conditions and

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[16] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[17] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[18] K.S.A. 2006 Supp. 44-501(a).

[19] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

accelerated his need for medical treatment. Respondent contends that the IME report from Dr. MacMillan breaks the tie in respondent's favor. Dr. MacMillan found no clear documentation that claimant sustained anything other than a provocation of his underlying medical conditions, specifically the spinal stenosis and multi-level spondylosis or degenerative disk disease. "Provocation" or to "provoke" is defined as to arouse, inflame or stimulate.[20]

Claimant counters respondent's arguments with his uncontradicted testimony regarding the accidents, coupled with the medical opinions of Dr. Stuckmeyer and Dr. Abrams. The sudden onset of symptoms following the three above-described accidents led both doctors to opine that claimant's work activities and these accidents contributed to claimant's ongoing and severe physical maladies. Dr. Ebelke's testimony that claimant's severe physical problems are not related to his work activities and the above-described accidents is difficult to accept. Claimant's description of his job duties and the accidents paints a different picture. The sudden onset of bladder incontinence after the April 27, 2007, accident was determined by Dr. Abrams to be directly connected.

In general, the question of whether the worsening of a claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether the claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.[21]

Claimant's long-term spine problems developed for a multitude of reasons. Not the least significant was his work for respondent and the three above-described accidents suffered while claimant worked as a working foreman for respondent. The Board finds that claimant suffered multiple accidental injuries while working for respondent, with the April 27, 2007, accident being the straw that broke the camel's back. The award of benefits by the SALJ for the injuries to claimant's lumbar spine is affirmed.

With regard to the alleged injuries to claimant's cervical spine, the Award sets out findings of fact and conclusions of law which the Board adopts as its own. Claimant has failed to prove that his cervical spine condition stems from or was aggravated by his employment with respondent. Instead, the evidence supports a finding that claimant's cervical spine condition is the result of congenital spinal stenosis. The denial of benefits by the SALJ for the cervical spine is affirmed.

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[20] Webster's II New College Dictionary (1995). Houghton Mifflin Company.

[21] *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

K.S.A. 2006 Supp. 44-510h(a) states:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2006 Supp. 44-510i states in part:

> (e) All fees and other charges paid for such treatment, care and attendance, including treatment, care and attendance provided by any health care provider, hospital or other entity providing health care services, shall not exceed the amounts prescribed by the schedule of maximum fees established under this section or the amounts authorized pursuant to the provisions and review procedures prescribed by the schedule for exceptional cases. With the exception of the rules and regulations established for the payment of selected hospital inpatient services under the diagnosis related group prospective payment system, a health care provider, hospital or other entity providing health care services shall be paid either such health care provider, hospital or other entity's usual and customary charge for the treatment, care and attendance or the maximum fees as set forth in the schedule, whichever is less. In reviewing and approving the schedule of maximum fees, the director shall consider the following:
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> (1) The levels of fees for similar treatment, care and attendance imposed by other health care programs or third-party payors in the locality in which such treatment or services are rendered;
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> (2) the impact upon cost to employers for providing a level of fees for treatment, care and attendance which will ensure the availability of treatment, care and attendance required for injured employees;
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> (3) the potential change in workers compensation insurance premiums or costs attributable to the level of treatment, care and attendance provided; and
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> (4) the financial impact of the schedule of maximum fees upon health care providers and health care facilities and its effect upon their ability to make available to employees such reasonably necessary treatment, care and attendance to each injured employee to cure and relieve the employee from the effects of the injury.

The SALJ ordered all medical bills for claimant's low back injury to be paid as authorized medical treatment to the extent that they are related to the low back and comply with K.S.A. 2006 Supp. 44-510i(e), the medical fee schedule. Respondent contends that

claimant regularly failed to request medical treatment, instead seeking treatment with his family physician on an unauthorized basis. However, the uncontradicted testimony of claimant is that he reported his problems and accidents to respondent, going as high as the company owners, several times. Not only was claimant not provided with medical care, he was not even allowed the opportunity to fill out an accident report. At no time leading to the final accident in 2007 was claimant referred for medical treatment by respondent. Claimant was forced to use canes, was assisted by co-workers, displayed a multitude of physical symptoms and was apparently regularly ignored by respondent. He ultimately had no choice but to seek and obtain medical treatment on his own. Respondent has failed in its obligation to provide medical treatment sufficient to reasonably cure and relieve claimant from the effects of these injuries. Respondent's argument that claimant failed to request medical treatment, after the numerous examples of claimant's requests falling on deaf ears, is disingenuous. The Order Nunc Pro Tunc of the SALJ that respondent and Continental Western pay all medical bills associated with the treatment provided for the low back within the parameters of K.S.A. 2006 Supp. 44-510i(e) is affirmed.

K.S.A. 2006 Supp. 44-511(a) states in part:

> (4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.
>
> (5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.[22]

The parties have stipulated that claimant earned $15,120.81 during the 26 weeks preceding the accident on April 27, 2007. The dispute centers around whether the weeks that claimant did not work due to scheduling or weather problems should be included

[22] K.S.A. 44-551(a)(4)(5).

in the calculation of the average weekly wage. Claimant contends that he only worked 16 of the 26 weeks and the wage should be calculated accordingly. Respondent contends that the full 26 weeks should be utilized in calculating the wage. Respondent's method of calculation would result in an average weekly wage of $581.57. Claimant's method would result in a wage of $945.05.

The question of what weeks to include when calculating a claimant's average weekly wage has been addressed by the Kansas Supreme Court in *Elder*.[23] In *Elder*, an employee covered by workers compensation was fatally injured. Both the Director of Workers Compensation (Director) and the district court found that K.S.A. 1992 Supp. 44-511(b)(5) required that the weeks an employee could have worked but did not work or earn any wages was to be included when averaging the employee's earnings over the 26-week period prior to the accident. The issue dealt with whether the statute excludes from the calculation the eight weeks when Elder did not work or was on "vacation" or "leave of absence". Elder earned a total of $5,140.86 during 18 of the 26 weeks prior to the accident. Elder did not work or earn wages during the other 8 weeks. The administrative law judge determined that "the eight weeks that claimant did not work but could have if he wanted" should be included in the computation of Elder's average weekly wage and used the entire 26 weeks to calculate the wage. The Director and the district court affirmed that finding, with the district court finding that "the eight weeks that the deceased worker did not work but could have if he wanted" was to be included in the calculation.[24]

The Supreme Court, in *Elder*, first considered the claimants'[25] argument that K.S.A. 1992 Supp. 44-511(b)(5) requires that any week when the worker is absent the entire week and performs no work, regardless of the reason for his or her absence, shall not be considered in the computation of the average weekly wage. The *Elder* Court found this argument to be without merit holding "the statute clearly states that for the exclusion to apply, the absence must be due to vacation, leave of absence, sick leave, illness, or injury."[26] The *Elder* Court next considered the claimants' argument that the *Osmundson*[27] case supported their position. In *Osmundson*, the claimant's work was seasonal. The claimant had worked 11 of the preceding 26 weeks, with work not being available to the

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[23] *Elder v. Arma Mobile Transit Co.*, 253 Kan. 824, 861 P.2d 822 (1993).

[24] *Id.* at 826.

[25] Elder's dependents (claimants).

[26] *Id.* at 827.

[27] *Osmundson v. Sedan Floral, Inc.*, 10 Kan. App. 2d 261, 697 P.2d 85 (1985).

claimant for 13 of 14 consecutive weeks. During that time, Osmundson was eligible for and was paid unemployment compensation when not working for the respondent. The Kansas Court of Appeals, in affirming the administrative law judge, but reversing the district court, utilized 11 weeks in arriving at an average weekly wage. The Kansas Supreme Court, in *Elder*, analyzed *Osmundson* as follows:

> The *Osmundson* court concluded that the legislature when enacting 44-511(b)(5) did not intend for the average weekly wage computation to include time during which a worker is entitled to draw unemployment compensation and is free to seek and accept other employment until work is again available from the regular employer. The *Osmundson* court found that the trial court should not have included the weeks when no work was available to claimant. It reasoned that the determining factor is that the worker is not employed because there is no work available for him or her to perform. 10 Kan. App. 2d 261.[28]

The *Elder* Court held that where the deceased was employed and work was available, but that with the approval of his employer, he did not work, he was on a leave of absence and the eight weeks should not be included in the calculation of the average weekly wage.

While *Elder* and *Osmundson* deal with slightly different issues, both reach the conclusion that those weeks when the worker is not employed because there is no work available for him or her to perform are not to be used in computing his or her average weekly wage pursuant to K.S.A. 44-511(b)(5).

In this instance, there were 16 weeks during which claimant earned wages with respondent. During the remaining weeks, no work was available due to weather and other related circumstances. While the Board acknowledges that this situation is not a "layoff" or a "leave of absence", it nevertheless fits within the logic of *Elder* and *Osmundson*. The average weekly wage will be calculated using only the 16 weeks during which claimant actually worked. Thus, the average weekly wage on claimant's date of accident was $945.05.

K.S.A. 44-510c(a)(2) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof

[28] *Elder, supra,* at 828.

> to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.[29]

Dr. Abrams testified that claimant was unable to return to any substantial gainful employment from the back injury alone. Dr. MacMillan found claimant to be permanently incapable of competing in the open labor market. Dr. Stuckmeyer opined that claimant was permanently and totally disabled, and Mr. Dreiling stated that claimant was not capable of returning to substantial and gainful employment in the open labor market.

Claimant is required to use either a cane or a walker daily. After the April 2007 accident, claimant developed bowel and bladder problems. Claimant experiences numbness and tingling in his feet, has a sitting tolerance of two hours and a standing tolerance of less than five minutes and can walk only 100 yards. He needs narcotic pain medication daily. The Board finds that claimant is permanently and totally disabled as the result of his work-related activities with respondent through April 27, 2007, with the work accident on that date being the final straw in a long line of work-related accidents.

The Board adopts as its own the findings and conclusions of the SALJ regarding claimant's entitlement to 5.71 weeks of additional TTD.

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation. . . .[30]

K.S.A. 44-557 states:

> (a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents,

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[29] K.S.A. 44-510c(a)(2).

[30] K.S.A. 44-520a(a).

> are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.
>
> (b) When such accident has been reported and subsequently such person has died, a supplemental report shall be filed with the director within 28 days after receipt of knowledge of such death, stating such fact and any other facts in connection with such death or as to the dependents of such deceased employee which the director may require. Such report or reports shall not be used nor considered as evidence before the director, any administrative law judge, the board or in any court in this state.
>
> (c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.
>
> (d) The repeated failure of any employer to file or cause to be filed any report required by this section shall be subject to a civil penalty for each violation of not to exceed $250.
>
> (e) Any civil penalty imposed by this section shall be recovered, by the assistant attorney general upon information received from the director, by issuing and serving upon such employer a summary order or statement of the charges with respect thereto and a hearing shall be conducted thereon in accordance with the provisions of the Kansas administrative procedure act, except that, at the discretion of the director, such civil penalties may be assessed as costs in a workers compensation proceeding by an administrative law judge upon a showing by the assistant attorney general that a required report was not filed which pertains to a claim pending before the administrative law judge.

Claimant has alleged specific accidents on October 6, 2004, on or about November 20, 2006, and on April 26, 2007, with a series of traumatic injuries in between to April 26, 2007. The Board has found claimant's effective date of accident in this matter to be April 27, 2007. Claimant's K-WC E-1, Application for Hearing, was filed with the Division on May 4, 2007, well within 200 days of the April 27, 2007, date of accident. Respondent did not dispute written claim for the April 27, 2007, date of accident. The Board finds that claimant filed his written claim in this matter within the time limit set by the statute.

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[31]

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[32]

The SALJ found that claimant had suffered a prior injury on August 27, 1984, which led to a preexisting functional impairment while employed with Brooks Construction Company, culminating with a settlement on October 8, 1985. There is no evidence in this record detailing the method used to establish that preexisting impairment. As noted by claimant in his brief to the Board, the legislature has mandated that the fourth edition of the AMA *Guides*[33] be utilized when establishing functional impairments. Also noted by claimant is the fact that the fourth edition of the AMA *Guides*[34] did not become effective until 1993. Therefore, it would be impossible for a preexisting impairment to be established pursuant to the fourth edition of the AMA *Guides*[35] without present day medical testimony supporting same. As no such credible evidence exists, no credit has been established. The Award granting respondent a credit pursuant to K.S.A. 2006 Supp. 44-501(c) is reversed. Dr. MacMillan's determination that none of claimant's many accidents caused any permanency is rejected as not credible.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[36] Accordingly, the findings

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[31] K.S.A. 2006 Supp. 44-501(c).

[32] K.S.A. 44-510e(a).

[33] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[34] AMA *Guides* (4th ed.).

[35] AMA *Guides* (4th ed.).

[36] K.S.A. 2006 Supp. 44-555c(k).

and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

CONCLUSIONS

The Award of the SALJ, finding that claimant suffered accidental injuries through April 27, 2007, which arose out of and in the course of his employment with respondent resulting in a finding that claimant is permanently and totally disabled, is affirmed. Additionally, claimant's medical expenses for his lumbar spine are awarded to the extent they comply with K.S.A. 2006 Supp. 44-510i(e) and K.S.A. 2006 Supp. 44-410j(h). The Award will be calculated based on an average weekly wage of $945.05. Respondent's request for a preexisting credit pursuant to K.S.A. 2006 Supp. 44-501(c) is denied.

In all other regards, the Award and Order Nunc Pro Tunc of the SALJ are affirmed insofar as they do not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Workers Compensation Board that the Award of Special Administrative Law Judge Seth Valerius, dated August 9, 2010, should be, and is hereby, modified to find that respondent has failed to prove that claimant suffered a preexisting functional impairment pursuant to K.S.A. 2006 Supp. 44-501(c), but affirmed in that claimant has proven that he suffered personal injury by accident through April 27, 2007, which arose out of and in the course of his employment with respondent, resulting in a finding that claimant is permanently and totally disabled.

In all other regards, the Award and Order Nunc Pro Tunc of the SALJ are affirmed insofar as they do not contradict the findings and conclusions contained herein.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Steven D. Brooks, and against the respondent, K.C. Flatwork Concrete, Inc., and its insurance carrier, Continental Western Insurance Company, for an accidental injury which occurred through a series of accidents and on April 27, 2007, and based upon an average weekly wage of $945.05.

Claimant is entitled to 54.14 weeks temporary total disability compensation at the rate of $483.00 per week totaling $26,149.62, followed by permanent total disability

compensation at the rate of $483.00 per week not to exceed $125,000.00 for a permanent total general body disability.

As of March 17, 2011, there would be due and owing to claimant 54.14 weeks of temporary total disability compensation at the rate of $483.00 per week in the sum of $26,149.62, plus 148.72 weeks of permanent total disability compensation at the rate of $483.00 per week in the sum of $71,831.76, for a total due and owing of $97,981.38, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $27,018.62 shall be paid at $483.00 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of March, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and Hawkeye Security
Nathan D. Burghart, Attorney for Respondent and Continental Western
Marcia L. Yates Roberts, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director